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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM R. APPLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A04-0712-CR-753
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS CIRCUIT COURT
The Honorable Jeffrey V. Boles, Judge
Cause No. 32C01-0506-FA-1

July 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

William Apple appeals from his convictions for two counts of Criminal Deviate Conduct While Armed with a Deadly Weapon, Class A felonies; four counts of Criminal Confinement While Armed with a Deadly Weapon, Class B felonies; Burglary, as a Class B felony; Robbery While Armed with a Deadly Weapon, a Class B felony; Battery, as a Class C felony; Theft, as a Class D felony; and Auto Theft, a Class D felony, following a jury trial. Apple presents the following issues for our review:

1. Whether the trial court erred when it entered judgment of conviction on both robbery and theft.

2. Whether his convictions for criminal deviate conduct and confinement with regard to a single victim violate Double Jeopardy principles.

3. Whether his sentence is inappropriate in light of the nature of the offenses and his character.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On May 31, 2005, Apple, armed with a handgun, entered Kehrein Orchard in Danville. Dinah Kehrein was working that day, and Evelyn Jones was making a purchase. Apple approached Kehrein, held his handgun to Kehrein's stomach, and demanded money from the cash register. All the while, Apple had a "hold of" Kehrein so that she could not get away. Transcript at 248. Apple repeatedly threatened to kill Kehrein, and he instructed her to put the money "in the front of [her] shorts." Id. Kehrein complied, removing approximately $600 from the cash register. When Apple reached inside Kehrein's shorts to get the money, she struggled with him. At that point,

the customer, Jones, saw what was going on and tried to leave the store. But Apple stopped Jones when he pointed his gun at her and told her that he would kill her if she tried to leave. Apple then demanded money from Jones, but she told him that she did not have any cash on her.

At that point, Apple grabbed both Kehrein and Jones by their hair and forcibly dragged them outside. Jones' sister-in-law, Jennifer, who had been waiting for Jones in her car, saw what was going on and ran into the street to get someone to help. In the meantime, Apple was trying to force Kehrein and Jones into a station wagon. Apple threatened to kill them if they did not comply. Jones pleaded with Apple to let her go, telling him that she had two daughters at home, but Jones refused. Finally, Jones managed to get free and ran into the street for help. Apple then struck Kehrein hard with his gun, breaking her nose. Apple told Kehrein that he would "come back to kill [her]," and Kehrein got up and ran inside the store. Id. at 272.

Jennifer had stopped a passing driver, John Lewis, who called police. While on the phone with police, Lewis saw Kehrein, with blood covering her face, run across the street. And Lewis saw a man driving a station wagon away from the scene. Police arrived too late to catch Apple. Emergency medical technicians arrived to administer treatment to Kehrein; she ultimately required approximately twenty stitches.

Kehrein's sister, Darlene Steele, soon arrived at the scene, and Steele's two granddaughters, S.L. and M.L., ages six and two respectively, were with her. When Steele learned that Kehrein was going to be alright, she drove her granddaughters to her parents' home nearby. When Steele and the girls arrived at the house, they noticed that

the garage door, which was usually open, was closed. Steele looked inside the garage and saw an unfamiliar station wagon parked there. Steele's parents were not home.

As Steele and the girls approached the house, Apple appeared, holding a gun and a steak knife. Apple moved close to Steele and said, "you either do what I say or I'll kill you." Id. at 377. Apple demanded money, but Steele told him that she only had a few dollars. Then Apple asked her how much gas she had in her truck, and she told him that the tank was approximately three-fourths full. Apple told Steele to go inside the house. Apple repeatedly threatened to kill Steele during this time.

Once everybody was inside, Apple ordered Steele to sit down on the couch. M.L. was crying, and Apple threatened to kill M.L. if Steele did not get her to stop crying. So Steele had M.L. on her lap, and she was trying to calm her down. Apple asked Steele to give him her jewelry, but she explained that her hands were too swollen to remove her rings. Then Apple ordered Steele to help him collect all of the telephones in the house. When they got to the master bedroom, Steele was getting that phone when Apple groped her left breast. S.L. and M.L. were in the room with Steele and Apple. Steele said, "[D]on't do this in front of my grandkids." Id. at 382. But Apple, still holding a gun and a knife, ordered Steele to pull up her shirt. Steele, a breast cancer survivor, had undergone several surgeries, and her breasts are marred by scar tissue. After Steele pulled her shirt up, Apple threatened to kill Steele if she did not also pull her shorts down. Steele complied.

Apple was standing right next to Steele and ordered her to lie down on the bed and to place M.L. on her bare chest. M.L. was still crying, and Apple again threatened to kill

her. S.L. was on the bed next to Steele, and S.L. put her hand over M.L.'s mouth to try to quiet her. Then Apple penetrated Steele's rectum with his finger. And Apple told Steele that he was going to "make [her] feel real good." Id. at 386. Then Apple put his tongue inside Steele's vagina.

At that time, Steele's mother, Clara Cornelius, walked into the bedroom. Apple stood up and pushed Clara into a chair, and he asked Clara how much money she had in her purse. Clara replied that she had twenty-five or thirty dollars. Then Clara complained that her heart was bothering her. Apple put his gun to Clara's temple and threatened to kill her. Steele's father, Thomas Cornelius, entered the room, and Steele was "spread eagle" on the bed, and the girls were crying. Id. at 389. Apple had not seen Thomas enter the room, and Steele tried to quietly convey to Thomas that he should go get the police. Thomas left the room, but he immediately reentered the room and said, "[W]hat's going on in here[?]" Id. at 390. Apple then stood up and said, "I can't take this baby crying any longer. I'm done here." Id.

Apple ordered Thomas to go with him to the garage. Apple cut the telephone lines inside the house on the way to the garage, and he repeatedly threatened to kill Thomas. When they reached the garage, Apple ordered Thomas to get the money out of the station wagon and threatened to kill him again, but Thomas did not comply. Ultimately, Apple got the money himself, and he got into Steele's truck and drove away. As he pulled out of the driveway, Apple waved to Steele, who was standing in the doorway.

The State charged Apple with two counts of criminal deviate conduct while armed with a deadly weapon, four counts of criminal confinement while armed with a deadly

weapon, burglary of a dwelling, robbery while armed with a deadly weapon, battery by means of a deadly weapon, theft, and auto theft. A jury found Apple guilty as charged. At sentencing, the trial court imposed fifty years for each criminal deviate conduct conviction, twenty years for each criminal confinement conviction, twenty years each for the burglary and robbery convictions, eight years for the battery conviction, and three years each for the theft and auto theft convictions. The trial court ordered that the sentences would run consecutively, with the exception that the theft and robbery sentences would be concurrent. The aggregate sentence is 231 years executed. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Theft and Robbery

Apple contends that because theft is a lesser-included offense of robbery, the trial court erred when it entered judgment of conviction on both counts. Indiana Code Section 35-38-1-6 provides that whenever a defendant is charged with an offense and an included offense in separate counts and the defendant is found guilty of both counts, judgment and sentence may not be entered against the defendant for the included offense. Our Supreme Court has held that theft is a lesser-included offense of robbery. See Duncan v. State, 735 N.E.2d 211, 214 (Ind. 2000). And the State concedes that the same evidence was used to support both the robbery and theft charges, making the theft a lesser-included offense of the robbery. Accordingly, we hold that the trial court erred when it entered judgment of conviction for both robbery and theft. We remand to the trial court with

instructions to vacate the theft conviction and sentence. See Tingle v. State, 632 N.E.2d 345, 350 (Ind. 1994).

Issue Two: Double Jeopardy

Apple next contends that his convictions for criminal deviate conduct and criminal confinement with regard to Steele violate double jeopardy principles. In particular, he asserts that the evidence that he confined Steele was the same evidence used to prove that he sexually assaulted her. We cannot agree.

Two offenses are the "same offense" in violation of the Indiana Double Jeopardy Clause if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Rutherford v. State, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007). Under the "actual evidence" test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Id. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish all of the essential elements of a second challenged offense. Id. "[T]he 'proper inquiry' is not whether there is a reasonable probability that, in convicting the defendant of both charges, the [fact-finder] used different facts, but whether it is reasonably possible it used the same facts." Bradley v. State, 867 N.E.2d 1282, 1284 (Ind. 2007) (emphasis original).

Confinement exists when there is a substantial interference with liberty without consent. Hopkins v. State, 747 N.E.2d 598, 606 (Ind. Ct. App. 2001), trans. denied. Any amount of force can cause a confinement because force, however brief, equals confinement. Id. "One who commits rape or criminal deviate conduct necessarily 'confines' the victim for at least long enough to complete such a forcible crime." Gates v. State, 759 N.E.2d 631, 632 (Ind. 2001). Apple's entitlement to relief on the double jeopardy question here "depends upon whether the confinement exceeded the bounds of the force used" to commit the criminal deviate conduct. Id.

The evidence shows that Apple, while armed with a handgun and a knife, forced Steele into the house. Once inside, Apple, still armed, confined Steele to a couch. Apple also ordered Steele to gather phones throughout the house. Thus, Apple was substantially interfering with Steele's liberty without her consent by his conduct unrelated to the deviate sexual conduct. We hold that the confinement exceeded the bounds of the force used to commit the criminal deviate conduct. There is no double jeopardy violation as a result of these convictions.

Issue Three: Sentence

We may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). Apple must persuade the appellate court that his sentence has met this inappropriateness standard of review. See Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). We hold that Apple has not satisfied that burden here.

Apple first contends that the nature of the offenses does not warrant an enhanced sentence. Initially, Apple acknowledges that the trial court accurately described the offenses as "bringing violence to defenseless people . . . in the sanctity of their businesses, in the sanctity of their homes." Brief of Appellant at 18. And Apple recognizes that "[s]exually violent offenses and crimes involving children are contemptible, engendering anger and revulsion toward those accused of such conduct." Id. at 18-19. But Apple asks us to compare the facts and circumstances of these crimes to those where lesser sentences were imposed in other cases. In particular, Apple directs us to Gates v. State, 759 N.E.2d 631, 632 (Ind. 2001) (130-year sentence), Fointno v. State, 487 N.E.2d 140 (Ind. 1986) (80-year sentence), and Oeth v. State, 775 N.E.2d 696 (Ind. Ct. App. 2002) (70-year sentence), trans. denied.

As the State points out, while those cases share some factual characteristics with the instant case, each of those cases involved single victims.[1] Here, in contrast, Apple terrorized seven victims, including two children under the age of eight, an elderly man, and an elderly woman with a heart condition. Moreover, these crimes were part of a two-day crime spree in two states. According to the presentence investigation report, on the day of, but prior to, the attacks at Kehrein Orchard, Apple allegedly committed the following:[2]

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[1] In Fointno, the victim's seven-year-old daughter was inside the van where the sexual assaults occurred, but the victim instructed her daughter to look in the other direction. There is no indication that the victim's daughter saw any part of the offenses.

[2] At the time of the PSI, there was an "Active Warrant" for those charges.

> [T]he defendant broke into the victim's home, dragged her around the house, took her into the bedroom and pulled her sweat pants down. He then inserted his finger into her anus in the presence of her 2-year-old son. He allegedly ransacked the house, and broke into a gun cabinet, taking one of the long guns. He then forced the victim and her son into her car and made them drive to various other homes while he broke into them. He eventually stole a station wagon at one of the homes leaving the victim and her son in an isolated area.

PSI App. at 606. And the next day, on June 1, 2005, Apple committed the following crimes in Illinois:[3]

> On 6/1/05, the defendant broke into the victim's home and had a handgun. He then demanded her car keys and money. She complied and gave him $40.00. The defendant then bound the victim's hands with the phone cord. He then forced her into her bedroom, made her [lie] on her bed, and he hit her in the face with the handgun when she resisted and told her "he would hurt her real bad." He then repeatedly placed his fingers in her vagina and anus and performed oral sex on her. He untied her and forced her to take a shower. As the defendant was washing himself, the victim fled out the front door. When the defendant left and the police attempted to pull him over, the defendant fled. His vehicle was later rendered inoperable because the defendant rammed a police car. At that time, he was taken into custody.

Id. at 608. Given the number of victims impacted by the instant offenses and the context of the two-day crime spree, we reject Apple's request that we analogize the instant case with Gates, Fointno, and Oeth.

We must also consider the heinous nature of the offenses. Apple terrorized two women at Kehrein Orchard, and he then proceeded to terrorize Steele, her small granddaughters, and her parents. He threatened to kill his victims numerous times, including the two-year-old, and his sexual assaults against Steele, in front of her

[3] Apple faced thirteen charges as a result of those events, and he pleaded guilty to two counts of Aggravated Criminal Sexual Assault with a Weapon. The trial court imposed an aggregate eighty-year executed sentence.

granddaughters, were depraved. Kehrein required approximately twenty stitches to her face as a result of Apple's blow with the handgun. And the psychological damage to Steele's granddaughters, who have their whole lives ahead of them, is likely to be great. We hold that the 231-year aggregate sentence is not inappropriate in light of the nature of the offenses.

Apple next contends that his sentence is inappropriate in light of his character. Apple first maintains that his "low IQ and history of mental illness are facts this Court should consider when determining the overall appropriateness of the 231-year sentence." Brief of Appellant at 24. Our supreme court has identified four factors "that bear on the weight, if any, that should be given to mental illness in sentencing."[4] Weeks v. State, 697 N.E.2d 28, 30 (Ind. 1998) (citing Archer v. State, 689 N.E.2d 678, 685 (Ind. 1997)). Those factors are: (1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. Id. In Archer, our supreme court held in part that:

> In a case where the court finds that defendant, who is mentally ill but able to distinguish right from wrong and therefore not legally insane, suffers from a serious mental illness, particularly a long-standing illness, or where that defendant's visions or voices led to bizarre behavior and played an integral part in the crime, the court may decide not to impose an enhanced sentence or may decide to otherwise accord significant weight to defendant's mental illness as a mitigating factor. On the other hand, where the mental illness is less severe and defendant appears to have more control

[4] In Anglemyer, our Supreme Court held that the weight a trial court gives to aggravators and mitigators is no longer subject to appellate review. But we think that the four-part test set out in Archer and Weeks is still useful in considering the impact of a defendant's mental illness in the context of Indiana Appellate Rule 7(B).

> over his thoughts and actions, or where the nexus between defendant's mental illness and the commission of the crime is less clear, the court may determine on the facts of a particular case that the mental illness warrants relatively little or no weight as a mitigating factor.

689 N.E.2d 678, 685 (emphasis added, footnotes omitted).

Apple has not directed us to evidence in the record to support each of the four factors set out in Weeks. While Apple cites to portions of the record indicating that he suffers from mild mental retardation and intellectual limitations, and that he has been diagnosed with "some significant psychopathology" and "antisocial personality," he does not explain how that evidence warrants a reduced sentence. PSI App. at 527. Apple does not make cogent argument, for instance, that his alleged mental illness renders him unable to control his behavior or that there is a nexus between his alleged mental illness and the instant offenses. Indeed, the evidence of his alleged mental illness is limited. Apple underwent five psychological evaluations, and none of the evaluator's reports indicate that he is unable to control his behavior or that there was a nexus between his mental illness and the instant offenses.[5] We are not persuaded that Apple's alleged mental illness warrants a reduced sentence.

Apple also asserts that the maximum sentence should be reserved for the worst offenses and offenders, and he contends that the facts and circumstances of this case do not fit that description. He points out that his criminal history consists of only one prior

[5] Dr. Gabra Gachaw expressly concluded that Apple's reported history of psychotic symptoms did not "have any temporal or causal relationship to the offenses in question." PSI App. at 322. And Don Olive, a Clinical Neuropsychologist, concluded that "there appears to be no clear evidence of mental disease or mental defect that militated against his capacity to appreciate the wrongfulness of his conduct." Id. at 511.

felony conviction and one prior misdemeanor conviction. But his prior felony conviction was for burglary, as a Class B felony, and the facts of that offense, which occurred in 1996, are as follows:

> According to the Probable Cause Affidavit, the defendant broke into the home of the victim, pushed her into her bedroom while holding a knife, and hit her in the head ordering her to disrobe. The defendant put the knife to the victim's neck and fondled her breasts and vaginal area. He also performed digital/anal penetration. When she needed to go calm one of her children, the defendant put the knife to her back and told her to put her son back to sleep and if she tried anything, he would kill her. The defendant punched her in the head again when she refused to go back in the bedroom. The victim's children both woke up at that time and a loud noise prompted the defendant to take the victim downstairs. The victim talked to him for an extended period of time and he left the house without further incident. The defendant offered to fix the door he had kicked in.

PSI App. at 606. While on probation following that conviction, Apple failed a urine screen.

And with regard to Apple's contention that he is not the worst offender and his is not the worst offense, we have observed:

> There is a danger in applying this principle that is illustrated in the instant case. If we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. In order to determine whether an offense fits that description, we would be required to compare the facts of the case before us with either those of other cases that have been previously decided, or – more problematically – with hypothetical facts calculated to provide a "worst-case scenario" template against which the instant facts can be measured. If the latter were done, one could always envision a way in which the instant facts could be worse. In such case, the worst manifestation of any offense would be hypothetical, not real, and the maximum sentence would never be justified.
>
> This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real

> or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied.

As our Statement of the Facts and Discussion show, Apple's offenses were heinous. Apple perpetrated the crimes against seven victims. Among the most disturbing facts is that Apple forced Steele, whose breasts were scarred as a result of treatment for cancer, to hold M.L. on her breast while he sexually assaulted her. In addition, S.L. was by Steele's side, holding her hand over M.L.'s mouth after Apple threatened to kill M.L. if she did not quiet down. Finally, Apple repeatedly threatened to kill his victims. Considering all the facts and circumstances, we cannot say that Apple's 231-year aggregate sentence is inappropriate in light of the nature of the offenses and the character of the offender.

Affirmed in part, reversed in part, and remanded with instructions.

DARDEN, J., and BROWN, J., concur.